

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAMES BASKIN</b>	)	
Claimant	)	
VS.	)	
	)	
<b>CITY OF JUNCTION CITY</b>	)	Docket No. 180,673
Respondent	)	
Self-Insured	)	

**ORDER**

Claimant requested Appeals Board review of the September 16, 1997, Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument by telephone conference on March 4, 1998.

**APPEARANCES**

Claimant appeared by his attorney, Seth G. Valerius of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Karen D. Pendland of Kansas City, Missouri. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board considered the record and adopted the stipulations listed in the Administrative Law Judge's Award.

**ISSUES**

The parties requested Appeals Board review of the following issues:

- (1) Did claimant suffer an accidental injury that arose out of and in the course of his employment?
- (2) Did claimant give respondent timely notice of the accident?
- (3) Did claimant's injuries disable him for at least one week from earning full wages?

Permanent partial general disability benefits were denied claimant because the Administrative Law Judge found claimant was not disabled for a period of at least one week

from earning full wages. At oral argument, the respondent requested the nature and extent issue be remanded to the Administrative Law Judge, if the Appeals Board reversed the Administrative Law Judge's finding on the issue of whether claimant's injuries disabled him for at least one week from earning full wages.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge found claimant had proven he hurt his right shoulder while working for the respondent on May 19, 1993. In regard to notice, the Administrative Law Judge found that claimant's supervisor had actual knowledge of claimant's accident and that satisfied the notice requirement contained in K.S.A. 44-520 (Ensley). The Administrative Law Judge also addressed a portion of the nature and extent issue as he found claimant was not entitled to a work disability. The Administrative Law Judge went on to find that claimant was limited to medical compensation because he was not disabled for a period of at least one week from earning full wages as required by K.S.A. 1992 Supp. 44-501(c).

Claimant contends K.S.A. 1992 Supp. 44-501(c) is not applicable because the record proves that claimant was disabled for a period of at least one week from earning full wages. Furthermore, claimant contends he left work because he could no longer perform the work as a sanitation worker because of his right shoulder injury. Thus, claimant argues he is eligible for a work disability.

On the other hand, respondent contends claimant has not proven he suffered an accidental injury that arose out of and in the course of his employment. Furthermore, claimant did not provide notice within ten days to the respondent and it was prejudiced thereby. Respondent, however, in its brief, does not present any argument in reference to how it was prejudiced by not receiving notice of the accident. Respondent also asserts the Administrative Law Judge's award should be affirmed as the evidence in the record does not prove that claimant's right shoulder injury disabled him for a period of at least one week from earning full wages.

(1)(2) Claimant testified he fell on his right shoulder on May 19, 1993, while working as a sanitation worker for the respondent. On the day of the accident, claimant was 60 years of age and he had worked as a sanitation worker for the respondent for some 14 years. Claimant testified his supervisor, Marcus R. Hammond, who drove the refuge truck, saw him fall. After the fall, Mr. Hammond asked claimant if he was hurt and claimant replied "I'm okay, let's go." The accident occurred on Wednesday, May 19, 1993, and claimant testified, although he suffered some pain, he was able to work the remaining two days of that week.

Claimant started a scheduled two-week vacation on Monday, May 24, 1993. Claimant testified his right shoulder worsened during the time he was on vacation to the point he sought medical treatment with his family physician, Ronald D. Mace, M.D., on June 2, 1993.

Dr. Mace examined claimant and diagnosed tendonitis of the right shoulder. The doctor referred claimant to physical therapy. Claimant received physical therapy treatment from June 3, 1993, through June 10, 1993. In a letter to Dr. Mace dated June 7, 1993, the physical therapist recommended claimant should have a 30 pound lifting restriction when released to return to work.

After Dr. Mace examined the claimant and reviewed the physical therapy notes on June 10, 1993, he released claimant to return to regular work without restrictions on June 14, 1993. Dr. Mace testified that claimant did not relate his right shoulder injury to his work. Claimant, however, testified he told Dr. Mace, at his initial visit on June 2, 1993, that he hurt his shoulder at work.

The physical therapist, in her initial note dated June 3, 1993, indicated a history from the claimant of working as a sanitation worker that involved heavy lifting. After knowing the nature of claimant's job, the physical therapist restricted claimant from overhead work and heavy lifting.

Claimant's supervisor, Mr. Hammond, testified he did not recall claimant falling off the refuge truck on May 19, 1993. Mr. Hammond also testified, on cross-examination, that claimant could have fallen and unless claimant indicated he was hurt he would not have made out an accident report. Mr. Hammond did testify he recalled claimant notifying him on June 7, 1993, the day claimant was to return to work from vacation, he had hurt his arm and he had a slip from the doctor referring him to physical therapy.

The Appeals Board finds the evidence in the record supports the Administrative Law Judge's finding that claimant, on May 19, 1993, sustained a right shoulder injury. This conclusion is supported by claimant's testimony and the contemporaneous medical treatment records indicating he injured his right shoulder. There is no evidence that claimant had right shoulder problems prior to the fall, and there is no evidence that claimant sustained an intervening accident.

The Appeals Board also finds the record supports the Administrative Law Judge's finding that claimant gave notice of accident to the respondent. Claimant testified his supervisor had actual knowledge of his fall. K.S.A. 44-520 (Ensley), in effect on the day of claimant's accident, provided that actual knowledge of the accident by the employer's authorized agent rendered the requirement for the claimant to give the employer notice within ten days unnecessary. Additionally, that statute also required respondent to provide proof it was prejudiced by claimant not giving the required notice. The Appeals Board finds the respondent failed to present any evidence of prejudice. The claimant obtained medical treatment on his own but there is no evidence that the medical treatment was inadequate or made his right shoulder injury worse.

(3) Claimant was denied permanent partial general disability benefits because the Administrative Law Judge found claimant was not disabled from work for at least one week from earning full wages as required by K.S.A. 1992 Supp. 44-501(c). Therefore, although the Administrative Law Judge found claimant's right shoulder injury compensable, claimant

was limited to an award of only medical compensation as required by the language of K.S.A. 1992 Supp. 44-501(c) in effect on the date of claimant's accident. The provisions of that statute had been the same since the 1975 legislature added the phrase "[e]xcept for liability for medical compensation, as provided by K.S.A. 44-510." The Kansas appellate courts before 1975 had held the requirement, that an injured worker be off at least one week from earning full wages, did not apply to workers who suffer injuries that result in permanent impairment. See Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977). The Kansas Court of Appeals had the opportunity to construe the statute with the 1975 amendment for the first time in 1996. The result was a claimant who had missed no work was denied permanent partial disability benefits. See Boucher v. Peerless Products, Inc., 21 Kan. 977, 911 P.2d 198, *rev. denied* 260 Kan. \_\_\_\_ (1996). The 1996 legislature responded to the Boucher decision by deleting this operative language from the Act and also made the amendment retroactive for any claims brought prior to the effective date of the amendment, April 4, 1996, unless the claim had been fully adjudicated.

The retroactive portion of the amendment was immediately challenged and in the case of Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. \_\_\_\_ (1997), the Court of Appeals held that the 1996 amendment affected the employer's vested right of defense and the vested right cannot be taken away by retroactive legislation as this would be the unconstitutional taking of property without due process of law. Therefore, as in this case, dates of accidents that occurred before April 4, 1996, are subject to the Boucher decision that held the language of K.S.A. 44-501(c) was plain and unambiguous and a claimant has to prove his injury disabled him for a period of at least one week from earning full wages.

The Administrative Law Judge, in the case at hand, found claimant had failed to prove his right shoulder injury disabled him for at least one week from earning full wages. The Appeals Board disagrees with that finding. The claimant injured his right shoulder on Wednesday, May 19, 1993. He testified, although he suffered some pain, he was able to continue to work both Thursday and Friday, May 20 and 21. The claimant started his scheduled two-week vacation on Monday, May 24, 1993. Claimant testified his right shoulder injury worsened while he was on vacation. Because of this worsening condition, claimant made an appointment with his family physician, Dr. Mace, who was also the respondent's company physician.

Dr. Mace saw claimant on June 2, 1993, while claimant was in his second vacation week. Dr. Mace found claimant with good range of motion but pain when claimant reached overhead. Claimant was then referred to a physical therapy treatment program.

Claimant participated in the physical therapy program from June 3, 1993, through June 10, 1993. The physical therapist noted, at claimant's initial session on June 3, 1993, that claimant should be restricted from overhead work and heavy lifting. On June 7, 1993, the physical therapist sent Dr. Mace a letter indicating that if claimant was returned to work a lifting restriction of 30 pounds should be recommended.

Claimant returned to see Dr. Mace on June 10, 1993. The doctor noted pain remained in claimant's right shoulder but had improved. Dr. Mace testified he had reviewed the physical therapy notes but still determined that claimant could return without restrictions to his regular work as a sanitation worker. He released claimant to regular duty for Monday, June 14, 1993.

Claimant's supervisor, Mr. Hammond, testified that claimant called him on Monday, June 7, 1993, the day claimant was to return to work from vacation, and notified him that he had arm problems. Claimant also brought Mr. Hammond a referral form from Dr. Mace's office for physical therapy that had started on June 3, 1993.

The Appeals Board finds the record supports the conclusion that claimant was off work because of his right shoulder injury from June 2, 1993, until he was released to return to work by Dr. Mace on June 14, 1993. The claimant did not lose any wages on June 2, 3, and 4 because he was on vacation. Nevertheless, claimant did lose wages from June 7 through June 11, 1993. Accordingly, the Appeals Board concludes claimant is not limited to medical compensation by K.S.A. 1992 Supp. 44-501(c).

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated September 16, 1997, should be, and is hereby, reversed and is remanded to the Administrative Law Judge to decide the one remaining issue of what is the nature and extent of claimant's disability.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Seth G. Valerius, Topeka, KS  
Karen D. Pendland, Kansas City, MO  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director